the respondent knew that the document in question was in respect of a loan transaction and he signed it of his own free will. The point which the learned magistrate failed to consider or completely ignored was: why did the respondent sign the document if his contention was that he had nothing to do with the transaction and that the debt was due from his brother? It is common ground that Veeramani was present at the time of the signing of the document. If the loan was to be repaid by him, why was he not made to sign the document? This was another point, in my opinion a vital point, which the learned magistrate failed to appreciate.

It would appear that the learned magistrate was unduly influenced by the fact that no evidence was produced to show that the document was explained to the respondent who knows no English. If that was his reason or one of his reasons for dismissing the action, in my opinion he was wrong. For my saying so I find support in the following statement of the law, with which I respectfully agree, in the judgment of Wood Ag.C.J., in *Ismail bin Savoosah & Ors.* v. *Hajee Ismail*:— [1]

"It was argued that the defendant being ignorant of the English language he is to be excused on that account from the performance of his contract, but it is to my mind clear that in the common principles which govern the law of contract, the person who contracts by a written document, whether or not he understands the language in which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained."

That brings me to one of the grounds of appeal in this case, namely, that this was not a case where there was any evidence of coercion, undue influence, mistake or misrepresentation. As I stated above, it is clear from the evidence that the respondent signed the document on which the claim was based of his own free will. He knew that the document was in respect of a loan transaction. He was not forced to sign the document. Thus there could be said to be no mistake or misrepresentation as to the nature of the transaction, and quite clearly there was no fraud. As regards the document itself, there was no irregularity.

Mr. Morris Edgar has argued on behalf of the respondent that, in view of what the learned magistrate has said about neither party calling Veeramani, this was a case where the evidence was evenly balanced, so that on the authority of *Selvadurai* v. *Chinniah* [2] the learned magistrate had no option but to dismiss the action, as the plaintiff had failed to prove his case. In my opinion there is not much force in that argument. Quite clearly, the learned magistrate did not rely on any presumption arising out of the fact that Veeramani was not called as a witness. Assuming that the oral evidence of the parties was evenly balanced, there was the document to create a preponderance in favour of the plaintiff. I do not see, therefore, how it can be argued that the evidence was evenly balanced.

I am not forgetting that an appellate court is never in as good a position to estimate the value of *viva voce* evidence as the magistrate who saw and heard the witnesses, but in coming to the conclusion that this was a case in which the learned magistrate should have found for the plaintiff I am not attempting to ride roughshod over any of his findings of fact. Indeed it is not clear from his judgment what findings of fact he made. In any event his ultimate decision was against the weight of and contrary to the evidence taken as a whole.

I would therefore allow the appeal, set aside the learned magistrate's order of dismissal of the action and substitute for it a judgment in favour of the appellant in the sum of $1,000. The respondent will pay the costs of this appeal and of the action in the court below.

Before concluding the matter I must say that I am deeply grateful to Mr. Morris Edgar for drawing my attention to the case of *Ismail bin Savoosah & Ors.* v. *Hajee Ismail, supra,* even though it was against him.

Appeal allowed.

Solicitors: *Athi Nahappan & Co.; Morris Edgar & Co.*

TAN BENG CHYE v. PUBLIC PROSECUTOR

[F.C. (Tan Ah Tah Ag.C.J., Buttrose and Chua JJ.) November 30, 1965]

[Singapore — Federal Court Criminal Appeal No. 28 of 1965]

Penal Code ss. 376 and 511 — Attempted rape — Ingredients of offence — Using criminal force with intent to outrage modesty under s. 354 of Penal Code.

The appellant had been convicted of attempting to commit rape. The evidence showed that the appellant had taken the complainant to some bushes where he took off his shorts and lowered his inner pants to his knees. He then made the complainant take off her coat and trousers, leaving her in her knickers, which she refused to take off. An old Chinese man then came to the place and the complainant shouted to him for help. Thereupon the appellant pulled up his inner pants, put on his shorts and started to run while buttoning them.

Held: (1) two ingredients must be proved before a person can be convicted under section 511 of the Penal Code, that is, first, there must be an attempt to commit the offence and second, some act must be done towards the commission of the offence;

(2) in this case the acts done by the appellant did not amount to an attempt to commit rape and therefore the conviction must be set aside and a conviction for using criminal force with intent to outrage modesty substituted for it.

FEDERAL COURT.

Dato' David Marshall for the appellant.

Dalip Singh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Chua J. (reading the judgment of the court): The appellant in this case was charged under section 376 and section 511 of the Penal Code with attempting to commit rape on one Chua Kim Heok and he was charged in the alternative under section 354 of the Penal Code with using criminal force on Chua Kim Heok with intent to outrage her modesty. He was convicted on the main charge and sentenced to three years' imprisonment.

For the appellant it was contended that the learned judge was wrong in accepting the evidence of the complainant that it was the appellant who attacked her. The main complaints are that the learned judge had accepted the evidence of the complainant without analysing and weighing it properly and that the learned judge had treated evidence which cannot be corroboration as being corroboration of the complainant's story.

The identification of the appellant as the assailant rested solely on the evidence of the complainant but it must be remembered that the question of the identity of the appellant as the assailant was a question of fact which had to be determined on the evidence and by the light of surrounding circumstances. On this question of fact the learned judge has recorded his findings with his reasons therefore in his judgment and this court should not interfere with the conclusion arrived at by the learned judge, who had had the advantage of hearing the witness and obtaining an impression of her veracity from her demeanour, except for substantial and compelling reasons.

The question of the credibility of a witness is eminently one for the court of trial before whom the witness appears. In this case we see no reason why we should not accept the finding of the learned judge.

We have examined the evidence with great care and we have come to the conclusion that the evidence which the learned judge said tended to implicate the appellant and corroborated the complainant's story was indeed corroboration of the complainant's story. We see no reason to differ from the conclusion reached by the learned judge that the appellant was the assailant.

The only point on which we entertain any doubt in this case is whether the appellant's conduct amounted to an attempt to commit rape. It is necessary to set out what the appellant did to the complainant.

The evidence of the complainant can be summarised as follows:

At about 5 p.m. on the 9th November, 1964 she left Serangoon Garden Estate where she was employed as a domestic servant and while she was walking home along a track the accused came from behind her and caught hold of her. She shouted for help. He covered her mouth with his right hand and said "Stop screaming and I will remove my hand." He removed his hand but she shouted for help again. He ordered her to walk into the nearby bushes but she refused. He took out a knife from his waist and repeated his order. She obeyed and shouted for help as she walked to the bushes. In the bushes the accused took off his shorts and lowered his inner pants to his knees. Then he pointed the knife at her and ordered her to take off her samfoo coat but she refused. He pointed the knife at her again and said he would kill her and she then took off her coat. Then he ordered her to take off her samfoo trousers but she showed reluctance. He threatened to stab her with the knife and she then took off her trousers. She was then in her knickers. He ordered her to kneel down but she refused. The accused then went on his knees and ordered her to take off her knickers but she refused. He threatened to stab her. She held tightly to her knickers. He then asked her to look at his penis but she refused. He pulled at her knickers, she pushed him to the ground. He stood up and threatened to kill her if she did not take off her knickers. She still refused. He knelt down and ordered her to spit on his penis but she refused. He asked her to squat down, she did so. He pushed her down. He spat on his penis and ordered her to caress his penis. She refused and stood up. He rubbed his penis for some time. He kept on rubbing his penis until an old Chinese man appeared on the scene. Seeing the old man pushing his bicycle along the track she shouted to him. As the old man came up to her the accused pulled up his inner pants, put on his shorts and started to run while buttoning them.

The relevant parts of section 511 of the Penal Code are as follows: "Whoever attempts to commit an offence.....and in such attempt does any act towards the commission of the offence....."

It is to be noted that two conditions are necessary. First, there must be an attempt to commit the offence and second, some act must be done towards the commission of the offence.

We have considered the acts of the appellant very carefully and we do not think that any single one of those acts or all of them collectively amount to an attempt to commit rape. With all due respect to the learned judge we do not agree that "the inference was irresistible that the assailant intended to insert his penis into the girl's private parts." The acts, however, undoubtedly amount to criminal force committed

with the intent to outrage the modesty of a woman and the appellant is guilty of an offence punishable under section 354 of the Penal Code.

We alter the conviction to one under section 354 of the Penal Code.

Order accordingly.

Solicitors: *David Marshall.*

RAWTHER v. ABDUL KAREEM

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and and Suffian J.) December 1, 1965]

[K.L. — Federal Court Civil Appeal No. 26 of 1965]

Practice and Procedure — Appeal — Judgment in default of appearance — Application for stay pending application to set aside judgment — R.S.C. 1957, O. 36 rr. 31 and 33.

In this case an application was made for the stay of an appeal on the ground that the judgment was obtained in default of appearance and the defendant wished to apply to have the judgment set aside.

Held: the court had a discretion whether to proceed to hear the case forthwith or to stay it pending an attempt by the appellant to have the judgment set aside and in the circumstances of this case and especially because of the fact that the appellant intended to apply for fresh evidence to be heard, the appeal should be stayed pending application being made to set aside the judgment.

Cases referred to:—

(1) *Vint* v. *Hudspith* 29 Ch.D. 322.

(2) *Armour* v. *Bate* [1891] 2 Q.B. 233.

FEDERAL COURT.

Morris for the appellant.

K. A. Menon for the respondent.

Thomson L.P. (delivering oral judgment): A preliminary point has been taken (and here I choose my words with some care) that we should not proceed with the hearing of this appeal by reason of the nature of the trial to which it is the sequel.

Counsel for the respondent used the expression that the appeal was "incompetent". If by that he meant there was no right of appeal in our view he went too far because clearly by section 67 of the Judicature Act there is a right of appeal from every judgment of the High Court.

The point, however, is this that when the matter came on for trial the defendant, the present appellant, was not present either by himself or counsel until the very last day of the trial which was six months after the hearing of evidence had been completed, when the judge was about to deliver and proceeded to deliver judgment against him. On that it was submitted that the case fell within R.S.C. Order 36, rules 31 and 33.

In our view the present case does fall within these rules but we do not agree that the effect of rule 33 is to make compliance with that rule a condition precedent without fulfilment of which an unsuccessful defendant cannot proceed to appeal. In our view, based largely on the cases of *Vint* v. *Hudspith* (1) and *Armour* v. *Bate,* (2) the true position is that this court has a discretion as to whether to proceed to hear the appeal forthwith or to stay it pending an attempt by the appellant to comply with rule 33. That discretion is to be exercised, of course, on the facts of each individual case and applying our minds to the facts of the present case we consider it relevant that the appellant has very candidly stated that he will inevitably be compelled to make an application for the hearing of fresh evidence. We express no views whatsoever as to the prospects of success of such application. But were such an application to be made and were it to be successful we should then be placed in the position, which would certainly not be conducive to the doing of justice and which might be far from conducive to the appellant's own interest, of having to weigh fresh evidence which we ourselves had heard against other evidence which the trial judge alone had heard.

In the circumstances we are of the opinion that the appeal should be stayed pending an application being made to the High Court under Order 36.

As regards costs, obviously whatever happens the question of costs is going to be very complicated and the question should stand over.

Barakbah C.J. (Malaya) and **Suffian J.** concurred.

Order accordingly.

Solicitors: *Morris Edgar & Co.; Talalla & Menon.*

YONG YOKE SUNG & ORS. v. SUNGEI WAY ESTATE

[F.C. (Thomson L.P., Pike C.J. (Borneo) and Gill J.) December 1, 1965]

[K.L. — Federal Court Civil Appeal No. 52 of 1965]

Master and Servant — Disobedience — Dismissal of workers for refusal to obey order of transfer and for absenting themselves from work — Breach of contract of service — Reasonableness of order of transfer — Appeal from labour commissioner — Procedure for appeal.

Employment — Breach of contract of service — Dismissal — Employment Ordinance, 1955, ss. 16 and 77(2).

Practice and Procedure — Appeal from labour commissioner — Employment Ordinance, 1955, s. 77(2) — R.S.C. 1957, O. 59 r. 13.

The appellants appealed against the decision of the High Court ([1965] 2 M.L.J. 229) which had dismissed their appeal against the decision of the commissioner of labour who had rejected a claim by the appellants to one month's wages in lieu of notice from their employers,